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No. 91-1404

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

BASHIRAHMED M. AMEJI, M.D.,

PETITIONER,

- versus -

FREDERIC J. COWAN, ATTORNEY GENERAL
COMMONWEALTH OF KENTUCKY,

RESPONDENT.

BRIEF IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CHRIS GORMAN
ATTORNEY GENERAL

RICKIE L. PEARSON
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR PETITIONER

QUESTION PRESENTED

I.

DID THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLY THE CORRECT STANDARD FOR DETERMINING WHETHER PETITIONER RECEIVED A FUNDAMENTALLY FAIR TRIAL WHEN EVIDENCE OF "OTHER CRIMES OR SIMILAR ACTS" WAS ADMITTED AS PART OF THE COMMONWEALTH'S PROOF TO SHOW THAT PETITIONER HAD BRIBED AND HARASSED A WITNESS? MOREOVER, DID THE STANDARD APPLIED ON REVIEW CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS?

II.

DID THE SIXTH CIRCUIT CORRECTLY CONCLUDE THAT PETITIONER WAS NOT DENIED HIS FEDERAL CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW WHEN THE STATE TRIAL COURT ALLOWED THE PROSECUTOR TO INTRODUCE EVIDENCE OF "OTHER CRIMES OR SIMILAR ACTS" TO PROVE PETITIONER'S INTENT OR KNOWLEDGE?

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BRIEF IN OPPOSITION TO
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FOR THE SIXTH CIRCUIT

Respondent, Frederic J. Cowan, Attorney General of the Commonwealth of Kentucky respectfully urges the Court to deny certiorari for the reasons which follow.

OPINION BELOW

The order of the court of appeals (entered September 13, 1991) in included in th Appendix at A1. The order of the court of appeals denying rehearing is included in the Appendix at A4. The Order of the district court dismissing petitioner's request for habeas corpus relief is included in the Appendix at A6. The magistrate's report, adopted by the district court, is included in the Appendix at A8.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved are the Sixth and Fourth Amendments to the United States Constitution. These provisions are adequately set forth in the petition and the respondent relies on them.

TRANSCRIPT CITATIONS

References to the state trial transcript are "TE"; to the state record of trial, "TR"; and to the attached Appendix, "A." Bashirahmed M. Ameji will be referred to as "petitioner."

COUNTERSTATEMENT OF THE CASE

On April 8, 1987, a Franklin Circuit Court Grand Jury returned a two (2) count indictment against petitioner (TR 186-191). Count I of the indictment alleged that petitioner had devised and engaged in a scheme to fraudulently obtain benefits from the Kentucky Medical Assistance Program (TR 186). The second count of the indictment alleged that petitioner submitted fraudulent claims for the benefits pursuant to the Assistance Program (TR 187). Also Count II of the Franklin County Indictment alleged nineteen (19) separate subcounts regarding the submission of fraudulent claims (TR 187-189). After plea bargaining with the Commonwealth, Count I of the indictment was dismissed and the

vast majority of the subcounts, as set forth in Count II of the indictment, were also dismissed (TR 192). As a result, petitioner entered a plea of guilty to the submission of a single fraudulent claim to obtain benefits form the Kentucky Medical Assistance Program, which is a Class A Misdemeanor (TR 193).

During the investigation of the Franklin County offenses, Eugena Keeton was interviewed by Robert D. Fockele, a senior investigator assigned to the Medical Fraud Control Division for the Office of the Attorney General. Keeton gave Fockele a written statement which disclosed the following:

> "I, Eugena Keeton, 404941921, am positive that Dr. Ameji has never examined my son Joshua, further I am positive that my son Bobby was never examined by Dr. Ameji in his Clinic, the day Bobby was discharged from Highland Regional Hospital."

(TE 192).

After giving the above statement, Keeton was contacted by Kimberly Music (TE 192). Keeton met Music at a Druthers Restaurant in Paintsville (Johnson County), Kentucky (TE 193), 195). During the conversation, music inquired as to whether any of Keeton's children had been treated by petitioner (TE 193). Keeton responded, "No, not that I recall" (TE 193). As the conversation progressed, Music offered Keeton money and clothing for her (Keeton's) children if Keeton would sign a paper stating that petitioner had seen Keeton's children (TE 193). This conversation was heard by Phyllis Blevins, Eugena Keeton's mother (TE 228). Keeton repeatedly refused to sign the document (TE 193). As a result, Music told Keeton that she (Music) worked at the Welfare Office and she would have Keeton's children taken if Keeton didn't cooperate with her (TE 193). Then Music asked Keeton if she would sign a paper stating that Dr. Ameji (petitioner) had never treated

her children (TE 193). Keeton agreed and Music said "Well I'll have to go hunt him [Dr. Ameji] I don't know where he's at . . . ." (TE 193). Music left and was gone for approximately five minutes when she returned with petitioner who was driving a car. (TE 193, 198).

Keeton and Music decided to proceed to Larry's Shop-A-Minute Store for the purpose of having the new statement notarized (TE 193, 194). Keeton refused to ride with Music and they proceeded in separate automobiles (TE 193-194). Keeton, her husband and mother (Phyllis Blevins) arrived at the store first (TE 194). Eventually, Music arrived (194). Music and the Keetons went into the store to sign the document before a Notary Public (TE 194). The statement Keeton signed stated the following:

> 7/25/87. To whom it may concern. This is to state that I, Eugena Keeton, social security number 404941921, birth date, 2/12/65, am the true mother of Joshua and Bobby Keeton. Joshua Keeton, 4072309703 was seen by Dr. Ameji on 12/21/84, Dr. Ameji checked him completed [sic] and treated him. I

have read this paper and I understand it. I am signing this under my own free will. Eugena Keeton.

(TE 201).

After signing the affidavit, Music was and Keeton agreed to meet at the Revco Drugstore (TE 194). Music and Keeton left the Minute Store (TE 149). Shortly thereafter, petitioner entered the store and purchased a soda (TE 149).

Keeton and Blevins proceeded to the Revco Drugstore where they waited for Music, but Music never arrived (TE 194). After leaving the drugstore, Keeton stopped by the local hospital in an attempt to locate Music (TE 194). In the meantime, petitioner came out to Keeton's automobile and told Blevins that if Kimberly Music didn't satisfy her, she should come and see him and he would take care of her (TE 194, 240-242). Eventually, Keeton telephoned Music and Music offered to pay $20.00 for all the trouble Music had caused Keeton (TE 194-195). This conversation was heard by Phyllis Blevins

(TE 231). Keeton refused to go pick up the money (TE 195).

On April 11, 1987, Investigator Fockele, received a telephone call from Jerry Sublett (TE 68). During the telephone conversation, Sublett told Investigator Fockele that he and Kimberly Music were patients of petitioner and they often made regular office visits together to see petitioner (TE 68). Sublett recalled that on one occasion while he, Music and petitioner were present in petitioner's examining room, a discussion ensued about the Franklin County trial (TE 69). During the conversation, petitioner stated that he had hired a woman who had in fact gotten four (4) patients to change their stories and petitioner was giving the woman "seventy five dollars a pop for each statement that she was able to obtain" (TE 69). As a result, petitioner produced a list of names which Music reviewed and indicated that she knew some of the people who were on the list (TE

69). Music also stated that she would be willing to contact those individuals "in the same fashion as the other woman" (TE 69). Based on the aforementioned telephone conversation, Investigator Fockele interviewed Sublett the next day (TE 69).

During the April 12, 1987, interview, Investigator Fockele further learned that while Sublett was hospitalized, Music had contacted Sublett five or six times (TE 70). Music contacted Sublett for the purpose of passing-on instructions for petitioner not to leave the hospital after making his evening rounds, because she had gotten Eugena and Bobby Keeton to change their stories (TE 70). When petitioner made his hospital rounds, Sublett informed petitioner about the message left by Music (Te 70). Apparently that evening, petitioner paid Music $100 for obtaining the statement from Eugena and Bobby Keeton (TE 70). In order to accomplish the payment, petitioner

wrote a check in Sublett's name and later that night Music received the check (TE 70).

On December 18, 1987, approximately eight (8) months after the return of the Franklin County Indictment, a Johnson County Grand Jury returned a two (2) count indictment against petitioner (TR 12). The Johnson County Indictment charged the following:

COUNT I

> During the period of June 1, 1987 through August 31, 1987, the above named defendants, Dr. Bashirahmed Ameji and Kimberly Music, alone or in complicity with each other committed the offense of Bribing of a Witness when they offered money and/or clothing to Eugena Keeton, a witness to be called in the trial of Indictment No. 87 CR 0024 Commonwealth v. Bashirahmed M. Ameji

COUNT 2

> During the period of June 1, 1987 through August 31, 1987, the above named defendants, Dr. Bashirahmed Ameji and Kimberly Music, alone or in complicity with each other committed the offense of intimidating a Witness when they threatened to take Eugena

> Keeton's children from her if she failed to change her testimony in the pending trial of Indictment No. 87-CR-0024 Commonwealth v. Bashirahmed Ameji.

(TR 12).

The jury found petitioner guilty on both counts. Petitioner was sentenced to five (5) years of imprisonment for bribing a witness and he received a $500 fine for harassing a witness (A5).

The Kentucky Court of Appeals upheld the conviction, reasoning that the disputed "other crimes" testimony was admissible to show that petitioner was aware of Music's actions concerning Keeton and that those actions were part of a common scheme or plan. Ameji v. Commonwealth, No. 88-CA-1173-MR, Slip Op. at 6 (Ky. Ct. App. May 19, 1989). The Kentucky Court of Appeals also held that the state trial court did not err by denying petitioner's motion for a directed verdict of acquittal. Id. at 9.

The Kentucky Supreme Court denied discretionary review. The United States District Court for the Eastern District of Kentucky at Pikeville adopted the magistrate judge's findings of fact and conclusions of law. It ordered that the petition for habeas relief be dismissed. The district court specifically concluded that petitioner was not denied fundamental fairness or due process of law because evidence of "other crimes or similar acts" was admitted during the state trial to show intent, knowledge and a common scheme or plan. The United States Court of Appeals for the Sixth Circuit affirmed the decision of the district court by concluding that petitioner's evidentiary issue did not rise to a level of constitutional magnitude.

REASONS FOR DENYING CERTIORARI

I.

THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT APPLIED THE CORRECT STANDARD FOR DETERMINING WHETHER PETITIONER RECEIVED A FUNDAMENTALLY FAIR TRIAL WHEN EVIDENCE OF "OTHER CRIMES OR SIMILAR ACTS" WAS ADMITTED AS PART OF THE COMMONWEALTH'S PROOF TO SHOW THAT PETITIONER HAD BRIBED AND HARASSED A WITNESS. MOREOVER, THIS STANDARD APPLIED DOES NOT CONFLICT WITH OTHER CIRCUIT COURTS OF APPEALS.

Petitioner contends that the standard used by the United States Court of Appeals for the Sixth Circuit for reviewing due process claims brought by habeas petitioners is in direct conflict with three other courts of appeals. See the Petition at p. 9. The respondent respectfully disagrees and states that the Sixth Circuit applied the correct standard in the case at bar and the aforementioned standard does not conflict with other courts of appeals. Therefore, there is no "true split" between circuits upon which to grant certiorari.

Recently in Estelle v. McGuire, 112 S.Ct. 475 (1991), this Court held that it is not the province of a federal habeas corpus court to reexamine state court determinations on state law questions. 112 S.Ct. at 480. This Court further concluded that in conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States. Id.

In its disposal of petitioner's due process claim, the Sixth Circuit reached two conclusions. First, it concluded the following:

> Upon consideration, we affirm the judgment of the District Court because petitioner was not deprived of a fundamentally fair trial. See Lundy v. Campbell, 888 F.2d 467, 469-70 (6th Cir. 1989) cert. denied, 110 S.Ct. 2212 (1990).

(A1).

Secondly, the Court concluded:

> Further, petitioner's claim that testimony was improperly admitted at trial is simply a question of state law. It does not rise to a level of constitutional magnitude. See Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988).

(A2).

Petitioner places heavy reliance upon three Sixth Circuit cases for concluding that the Court of Appeals employs a standard that is in conflict with other courts of appeals for resolving fundamental fairness arguments or due process claims made by habeas petitioners. See the Petition at pp. 10-11. Petitioner cites Cooper and Lundy, supra, for the proposition that the Sixth Circuit reviews the aforementioned claims not to determine the prejudicial effect of disputed testimony but only to determine whether there exists "substantial evidence" to sustain the conviction on the record as a whole. Id. He also relies upon a third case, Waters v. Kassulke, 916 F.2d 329 (6th Cir. 1990), for the proposition that

the Sixth Circuit looks to the "context of the entire record" to determine whether or not the petitioner received a fundamentally fair trial. See the Petition at pp. 10-11.

The respondent submits that a close review of the Sixth Circuit's Order in this case reveals that the Court relied upon Cooper v. Sowders for a limited purpose. The Court cited the case and referred to page 286 (A3). On that particular page, the Sixth Circuit set forth its pre-Estelle v. McGuire standard for reviewing fundamental fairness claims raised as a result of evidence admitted during a state trial. Although Cooper was decided before Estelle, the standard for review in each case is the same. Moreover the Sixth Circuit added additional language, which is nothing more than a logical conclusion which can be reached in Estelle, and stated that, ". . . where the violation of a state's evidentiary rule has resulted in a

denial of fundamental fairness, thereby violating due process, federal habeas corpus relief will be granted." Cooper, 837 F.2d at 286.

With respect to Lundy, the Court again cited the case for a limited purpose. The Sixth Circuit relied upon Lundy at pages 469-470 (A2). A review of these pages reveal that in the Lundy opinion, the Court engaged in a lengthy discussion regarding the relationship created between state and federal courts by federalism and comity. Lundy, 467 F.2d at 469-470. In its lengthy explanation, the Sixth Circuit reaches the same conclusion as this court recently held in Estelle v. McGuire, supra. Therefore, petitioner's reliance upon Cooper and Lundy, is misplaced and must be completely discounted as giving rise to a "true split" among circuit courts of appeals.

Further examination of Cooper and Lundy reveals that the "entire context of the record" standard was utilized as a basis for resolving a fundamental fairness issue where the petitioner argued that cumulative errors had denied him due process of law. See Cooper, 837 F.2d at 288; Lundy, 888 F.2d at 472. There was no need for the Sixth Circuit to apply the "entire context of the record" standard in the instant case, because petitioner did not allege that he was denied due process by cumulative errors.

The third case upon which petitioner relies is Waters v. Kassulke, 916 F.2d 329 (6th Cir. 1990). Petitioner relies upon this case because it cites Lundy v. Campbell, supra, and discusses the "context of the entire record" standard. See the Petition at p. 10. Once again, petitioner concludes that the standard set forth in Waters gives rise to a split between circuit courts of appeals. The Waters case has no impact upon the case sub judice, because that

particular case was not relied upon by the Sixth Circuit in disposing of petitioner's due process claim. However, it is interesting to note that the Waters case resolved a due process or fundamental fairness claim similar to the one at bar. The issue with respect to the Waters case was whether evidence of prior bad acts should have been admitted to prove knowledge and intent on the part of the petitioner at the time he committed the crime. Waters, 916 F.2d at 336. The Waters case reveals that the Sixth Circuit did not rely upon the "entire context of the record" standard to resolve the evidentiary question. Id. Instead, it resolved the issue by applying the "probative value and prejudicial effect" standard as the federal district court did in the present case (A13-14); See also United States Ex Rel. Palmer v. DeRobertsis, 738 F.2d 168, 171 (7th Cir. 1984) (applying the probative value and prejudical effect approach);

Thigpen v. Thigpen, 926 F.2d 1003, 1015 (11th Cir. 1991) (applying the probative value and prejudicial effect approach). In short, the Waters court reviewed the "prior bad acts" evidence to determine whether there existed a recognized reason for admitting the evidence and concluded that the probative value of the evidence outweighed its prejudicial effect. Waters, 916 F.2d at 336.

The Sixth Circuit employed the correct standard for reviewing petitioner's claim. By affirming the judgment of the federal district court, including its analysis of the facts and the testimony presented, the Sixth Circuit could conclude as it did that petitioner had not raised an issue which rose to a "level of constitutional magnitude." (A3). By employing the Estelle standard, the Sixth Circuit was not required to engage in a de novo determination regarding petitioner's due process claim.

Therefore, the correct standard was applied and there exists no split between courts of appeals and the Sixth Circuit.

II.

THE SIXTH CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER WAS NOT DENIED HIS FEDERAL CONSTITUTIONAL RIGHT OF DUE PROCESS OF LAW WHEN THE STATE TRIAL COURT ALLOWED THE PROSECUTOR TO INTRODUCE EVIDENCE OF "OTHER CRIMES OR SIMILAR ACTS" TO PROVE PETITIONER'S INTENT OR KNOWLEDGE.

The United States Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and concluded that petitioner had not been deprived a fundamentally fair trial (A1). The District Court adopted the Magistrate Judge's recommendation and dismissed the petition over Ameji's objections (A3). The Magistrate Judge concluded the following:

> The testimony of the six witnesses allowed by the trial court was relevant and properly admitted. As the Kentucky Supreme Court recognized in Jones v. Commonwealth, Ky., 564 S.W.2d 366 (1977):

> All evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also prove or tend to prove the commission of other crimes by him or to establish collateral facts. The fact that it may tend to prejudice the accused in the minds of jurors is not a ground for its exclusion. Id. at 363.

It is clear that the testimony of the six witnesses was not designed to show that petitioner was a person of bad character or had a general propensity for criminality. To the contrary, the testimony was admitted to show petitioner's criminal intent, knowledge, and the existence of a plan or scheme to bribe and harass a witness. As the Kentucky Court of Appeals held:

> Moreover, due to lack of extensive evidence of [petitioner's] direct involvement with Keeton, there was a clear need for this evidence which outweighed its prejudicial effect. Thus, the evidence was admissible.

Ameji v. Commonwealth of Kentucky, 88-CA-1173-MR (Slip Opinion p. 9). Therefore, the admission of such evidence by the trial court was proper and petitioner's due process rights to a fundamentally fair trial were not violated.

(A4).

A. Kentucky Law

In Jones v. Commonwealth, Ky., 564 S.W.2d 366 (1977) the Supreme Court of Kentucky recognized that:

> All evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also prove or tend to prove the commission of other crimes by him or to establish collateral facts. The fact that it may tend to prejudice the accused in the minds of the jurors is not a ground for its exclusion. [Emphasis added.]

Id. at 363.

Consequently, evidence of another crime or similar act is admissible when the crime has a special relationship to the offense charged, that is, the evidence would show: motive, identity, absence of a mistake or accident, intent, knowledge, or common scheme or plan. Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 552 (1985). Additionally, evidence of "other acts or crimes" is admissible if it is relevant to the issues other than proof of a general criminal disposition and the possibility of

prejudice to the accused is outweighed by the probative worth and need for the evidence. O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 156 (1982).

Before evidence of other crimes can be admitted to show a scheme, plan or system, the evidence must show acts, circumstances or crimes similar to, clearly connected with and not too remote from the one charged. Id., 634 S.W.2d at 156-157.

B. Federal Law

The status of federal law regarding the admissibility of evidence concerning prior crimes or other acts requires the same considerations as does Kentucky law. The only difference between the state and federal law is that the federal law has its origin in the Federal Rules of Criminal Procedure. The law regarding the admissibility of other crimes or similar acts is well-settled in this circuit. This area of the federal law was recently

reviewed in United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988). See also United States v. Campbell, 845 F.2d 1374, 1380 (6th Cir.), cert. denied, 109 S.Ct. 259 (1988). The Zelinka court observed the following:

> The Supreme Court recently dealt with Rule 404(b) in a case involving a somewhat different issue than that now before us. See Huddleston v. United States, ___ U.S. __ , 108 S.Ct. 1496, 99 L.Ed.2d 771 (1988). In the course of reaching its decision the Court set forth the basic analysis required in determining the admissibility of evidence under Rule 404(b). The Court stated that the rule 'generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect on the actor's character, unless that evidence bears upon a relevant issue in the case such as motive, opportunity, or knowledge.' 108 S.Ct. at 1499. The Court continued, 'The threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character.' Id. Finally the Court quoted the Advisory Committee Notes to Rule 404(b): "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.' Id. relevancy requirement.

Decisions of this court issued prior to Huddleston have employed the Huddleston analysis. See, e.g., United States v. Blankenship, 775 F.2d 735, 739 (6th Cir. 1985), where we wrote:

> 'When the prosecution claims such evidence is offered for a permissible purpose, the trial court must make two inquiries before admitting the evidence. First, it must determine that the evidence is relevant; that is, the evidence must relate to a matter which is 'in issue,' and must deal with conduct substantially similar and reasonably near in time to the offenses for which the defendant is being tried. United States v. Ring, 513 F.2d 1001, 1005 (6th Cir. 1975). Even if the relevancy criteria are met a trial court has discretion to exclude the evidence if 'its probative value is substantially outweighed by the danger of unfair prejudice . . . .' Rule 403, Fed.R.Evid.; United States v. Largent, 545 F.2d 1039, 1043 (6th Cir. 1976), cert. denied, 429 U.S. 098, 97 S.Ct. 1117, 51 L.Ed.2d 546 (1977); Ring, 513 F.2d at 1005; [U.S. v.] Burkley, 591 F.2d [903] at 920 [D.C. Cir. 1978].'

Zelinka, 862 F.2d at 98-99.

The Huddleston court also observed that:

> Extrinsic acts evidence may be critical to the establishment of the truth as to a disputed issue, especially when that issue

> involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct. [Emphasis added].

108 S.Ct. at 1499.

Finally, the Huddleston court recognized that, "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts." Id. at 1502.

C. Discussion

The state and federal evidentiary considerations are the same when evidence of other crimes or similar acts is admitted to prove motive, identity, intent, knowledge, absence of mistake or accident, or common scheme or plan. Thus, in the case at bar, the state and federal appellate courts applied the correct standard.

Petitioner's assertion that "other crimes or similar acts" evidence should not have been

admitted because petitioner admitted that he had acted in concert with music and others in investigating the nineteen specific charges of fraud alleged in the indictment, is not true. Even if it were, such a position taken by petitioner would have no impact upon the Commonwealth's case-in-chief. Moreover, petitioner's assertion ignores the fact that the prosecution must prove all of the elements of a criminal offense beyond a reasonable doubt. See Estelle v. McGuire, 112 S.Ct. 475, 480 (1991). Stated otherwise, the Commonwealth's anticipation of what the defendant might prove at trial has no impact upon the Commonwealth's requirement to prove its case beyond a reasonable doubt and certainly has no impact upon whether the trial court should admit certain evidence during the Commonwealth's case-in-chief.

The testimony of the six witnesses during the state trial was relevant and properly

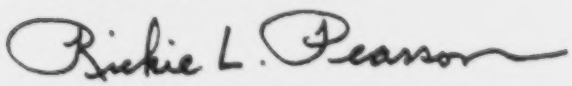
admitted. The testimony obviously was not designed to show that petitioner was a person of "bad character" or that he had a "general propensity for criminality." The testimony was admitted to show petitioner's criminal intent, knowledge, and that a plan or scheme existed to bribe and harass Eugene Keeton. Furthermore, the acts in question were committed in close proximity to the bribing and harassing of Keeton. The probative value of the aforementioned testimony far outweighed any prejudicial effect it would have on the jury. After all, the jury knew the limited purpose for which the testimony was introduced and was admonished accordingly. (TE 272-273). Consequently, petitioner was not denied due process of law and he received a fundamentally fair trial.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

CHRIS GORMAN
ATTORNEY GENERAL



RICKIE L. PEARSON
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY
40601-3494

COUNSEL FOR RESPONDENT

APPENDIX

APPENDIX
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5429

BASHIRAHMED M. AMEJI, M.D.,
Petitioner-Appellant

v.

FREDERIC J. COWAN, Attorney General,
Commonwealth of Kentucky
Respondent-Appellee

[Filed Sep. 13, 1991]

ORDER

BEFORE: KEITH and MARTIN, Circuit Judges,
and TAYLOR, District Judge.

Bashirahmed M. Ameji appeals the dismissal of his petition for writ of habeas corpus filed under 28 U.S.C. § 2254. This case has been referred to a panel if the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

The Honorable Anna Diggs Taylor, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

Following a jury trial in the Johnson County, Kentucky, Circuit Court in April 1988, Ameji was convicted of bribing a witness and intimidating a witness, and was sentenced to five years imprisonment. Ameji's convictions were affirmed by the Kentucky Court of Appeals on direct appeal and the Kentucky Supreme Court denied a motion for discretionary review.

Ameji then filed his habeas petition in the district court alleging that: (1) insufficient evidence supports his convictions; and (2) improper testimony was admitted into evidence at trial. The magistrate judge recommended that the petition be dismissed. The district court adopted the magistrate judge's recommendation and dismissed the petition over Ameji's objections.

Upon consideration, we affirm the judgment of the district court because petitioner was not deprived of a fundamentally fair trial. See Lundy v. Campbell, 888 F.2d 467, 469-70 (6th Cir. 1989), cert. denied, 110 S.Ct. 2212 (1990). First, federal courts must accept the statement of facts as provided by the Kentucky Court of Appeals as correct pursuant to 28 U.S.C. § 2254(d) because petitioner does not contend that the statement is erroneous. See Sumner v. Mata, 455 U.S. 591, 591-93 (1982) (per curiam); Smith v. Jago, 888 F.2d 399, 407-08 (6th Cir. 1989), cert. denied, 110 S.Ct. 2572 (1990). Viewing the evidence in the light most favorable to the prosecution, see Brown v. Davis, 752 F.2d 1142, 1147 (6th Cir. 1985), we conclude that petitioner's convictions are supported by ample evidence, albeit largely circumstantial evidence under the test enunciated in Jackson v. Virginia, 443 U.S. 307, 313-24 (1979). See United States v. Vannerson, 786 F.2d 221, 225 (6th Cir.), cert. denied, 476

U.S. 1213 (1986). Further, petitioner's claim that testimony was improperly admitted at trial is simply a question of state law that does not rise to a level of constitutional magnitude. See Cooper v. Sowders, 837 F.2d 284, 286 (6th Cir. 1988).

Accordingly, the judgment of the district court is affirmed pursuant to Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

A TRUE COPY

Attest:

LEONARD GREEN
Clerk

By /s/ Diane Schneer
Deputy Clerk

Issued as Mandate: 12/11/91

Costs: No Costs

Filing Fee . . . . . $
Printing . . . . . $
Total . . . . . $

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 91-5429

BASHIRAHMED M. AMEJI, M.D.,
Petitioner-Appellant

v.

FREDERIC J. COWAN, Attorney General,
Commonwealth of Kentucky,
Respondent-Appellee

[Filed Dec. 2, 1991]

ORDER

BEFORE: KEITH and MARTIN, Circuit Judges,
and TAYLOR, District Judge.*

Bashirahmed M. Ameji petitions for a rehearing of this court's September 13, 1991, order affirming the district court's dismissal of his petition for a writ of habeas corpus filed under 28 U.S.C. § 2254.

Upon careful consideration of the petition for rehearing, the panel concludes that it has not overlooked or misapprehended any point of law or fact in its order of September 13, 1991. Fed. R. App. P. 40(a).

Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Clerk

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*The Honorable Anna Diggs Taylor, U.S. District Judge for the Eastern District of Michigan, sitting by designation.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 89-256

BASHIRAHMED M. AMEJI, M.D.,
Petitioner,

vs:

FREDERIC J. COWAN, ATTORNEY GENERAL, ETC.,
Respondent.

[Filed Mar. 26, 1991]

ORDER

United States Magistrate Judge Peggy E. Patterson having recommended that relief in the above-styled habeas corpus cause of action be denied [Record No. 19], and having considered de novo the the petitioner's objections thereto [Record No. 20], and being advised,

IT IS ORDERED herein as follows:

(1) that the petitioner's objections to Magistrate Judge Patterson's Report and Recommendation be, and the same hereby are, OVERRULED.

(2) that said Report and Recommendation be, and same hereby is, ADOPTED as the court's findings and conclusions.

(3) that the above-styled cause be, and the same hereby is, DISMISSED and STRICKEN FROM THE DOCKET.

This the 26th day of March, 1991.

/s/ Joseph M. Hood
JOSEPH M. HOOD, JUDGE

Date of Entry and Service: Mar. 26, 1991

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Civil Action No. 89-256

BASHIRAHMED M. AMEJI, M.D.,
Petitioner,

vs.

ATTORNEY GENERAL OF THE COMMONWEALTH
OF KENTUCKY,
Respondent.

[Filed Jan. 15, 1991]

MAGISTRATE JUDGE'S REPORT AND
RECOMMENDATION

Bashirahmed M. Ameji, M.D., petitioner, filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent, Frederick J. Cowan, Attorney General, Commonwealth of Kentucky, filed a response to which petitioner filed a reply. Currently ripe for decision, this matter has been referred to the undersigned for initial consideration and a report and recommendation. 28 U.S.C. § 636(b)(1)(B).

On April 8, 1987, a Franklin Circuit Court Grand Jury indicted petitioner on the following two counts: Count One alleged petitioner devised and engaged in a scheme to fraudulently obtain benefits from the Kentucky Medical Assistance Program; County Two alleged that petitioner submitted fraudulent claims for

benefits pursuant to the Assistance Program. Following a plea bargain where the Commonwealth dismissed County One of the indictment, petitioner entered a plea of guilty to submission of a fraudulent claim to obtain benefits from the Kentucky Medical Assistance Program, a Class A misdemeanor. On December 18, 1887, approximately eight months after the Franklin County indictment, a Johnson County Grand Jury indicted petitioner and a co-defendant, Kimberly Music, with acting in complicity to bribe and intimidate Eugena Keeton, a witness scheduled to testify in the Franklin County proceeding. On May 23, 1988, following a jury trial finding petitioner guilty on both counts of the indictment, the Johnson Circuit Court sentenced petitioner to five (5) years' imprisonment for bribing a witness and imposed a $500.00 fine for harassing a witness. By an unpublished opinion dated May 19, 1989, the Kentucky Court of Appeals affirmed petitioner's conviction for both offenses. By order dated August 11, 1989, the Kentucky Court of Appeals denied petitioner's petition for rehearing. By order dated November 22, 1989, the Supreme Court of Kentucky denied petitioner's motion for discretionary review.

Petitioner raises two arguments in support of his petition to this Court for habeas corpus review of his Johnson County convictions: first, the admission of "other crimes or similar acts" evidence violated petitioner's due process right to a fundamentally fair trial; second, the evidence submitted against him was insufficient to meet the standard of Jackson v. Virginia, 443 U.S. 307 (1979).

The standard by which this Court must review petitioner's claims is well established. The

admission or exclusion of evidence in a state trial will not be questioned in a federal habeas corpus proceeding unless such admission or exclusion renders the trial so fundamentally unfair as to constitute a denial of due process. Logan v. Marshall, 680 F.2d 1121, 1123 (6th Cir. 1982).

First, petitioner asserts that the admission of evidence regarding other crimes or similar acts was highly prejudicial and violated his due process right to a fundamentally fair trial. Evidence of prior crimes or similar acts is admissible in Kentucky when the act has a special relationship to the offense charged; the evidence must show motive, identity, absence of mistake or accident, intent, knowledge, or common scheme or plan. Pendleton v. Commonwealth, Ky., 685 S.W.2d 549, 552 (1985). Evidence of prior crimes or similar acts is admissible if the evidence is relevant to the issues, establishes more than a general criminal disposition and the possibility of prejudice to the accused is outweighed by the probative worth of the evidence. O'Bryan v. Commonwealth, Ky., 634 S.W.2d 153, 156 (1982). Therefore, evidence of other crimes or similar acts is admissible to show a scheme or plan where the acts are connected with and not too remote from the charged offense. Id. at 156.

Petitioner maintains that none of the witnesses who testified about similar acts was bribed or harassed by his co-defendant Music, at petitioner's discretion; therefore, admission of such evidence is unduly prejudicial and rendered petitioner's trial fundamentally unfair. It is clear, after a thorough review of the trial transcript, that the testimony of the six witnesses was relevant to the issue of whether

petitioner knew of Music's actions concerning Eugena Keeton, whose allegations formed the basis of the Johnson County Indictment, and whether Music's acts were part of a common scheme or plan devised by petitioner and Music to avoid petitioner's prosecution in Franklin County. Iris Austin testified that Music came to her home on four occasions requesting that she sign a statement to the effect that three of her children were treated by petitioner on certain dates. When Austin erased her signature from the statement, Music had medical charts which reflected that Austin's children had been seen by petitioner. Austin testified that petitioner never treated her children. On another occasion Music returned with Austin's neighbor to try and convince Austin to sign. [TE 85-94.] Jenny Dardy testified that petitioner gave her a list of dates to refer to in the event she was questioned by the Attorney General's office. [TE 99-103]. Laura Frisk testified that she signed an affidavit in petitioner's office stating that she had been treated on eight specific dates by petitioner in exchange for his promise of free medical care for her entire family until 1990. Frisk also testified that petitioner promised to help her mother receive social socurity (sic). This affidavit is in direct contrast to an earlier statement where Frisk stated that she had never been examined by petitioner. [TE 104-124]. Jackie Salyer testified that, after signing an affidavit for the Attorney General's office stating that her children were never examined by petitioner, petitioner became very upset during an office visit and warned her that police were investigating her for selling drugs. [TE 125-130]. Charlotte Blevins, Eugena Keeton's sister, testified that petitioner's wife, a pediatrician sharing an office next to petitioner, asked Blevins to talk to Keeton

about her statement to the Attorney General. Petitioner's wife also assured Blevins that she did not have to pay for medical treatment. [TE 168-179]. Finally, Linda Swanson testified that an employee of petitioner approached her to sign an affidavit which differed from the one she had signed at the Attorney General's office. After Swanson refused, petitioner's employee presented files from his office and asked Swanson if the treatment dates were correct. When she said they were not, the employee approached Swanson about applying for a job at petitioner's office. Co-defendant Misic also visited Swanson and asked why she would not sign the affidavits. Music also indicated to Swanson that she was working for petitioner as a favor. [Swanson's Dep.].

Petitioner argues that the trial court, as well as the Kentucky Court of Appeals, failed to distinguish between lawful attempts to obtain retractions and unlawful attempts to obtain retractions by bribery and intimidation. Petitioner maintains that the evidence presented by the six witnesses does not demonstrate that petitioner or co-defendant Music attempted to bribe or intimidate any witness. Petitioner supports this argument with a recent Ninth Circuit decision, McGuire v. Estelle, 873 F.2d 1323 (9th Cir. 1989), where defendant was convicted in a California state court for murdering his six-month old baby. Defendant filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 asserting that the admission of evidence of possible sexual abuse violated his right to a fundamentally fair trial. The court found such evidence highly prejudicial as "the jury, however, was presented with no direct proof of whether McGuire or his wife caused these prior injuries. . ." Id. at

1326. These facts, however, are distinguishable from the present case. Contrary to petitioner's assertion, there is direct proof that petitioner conspired with co-defendant Music to bribe and intimidate Eugena Keeton. The testimony of Eugena Keeton, Terry Sublett, co-defendant's boyfriend, and Robert Fockle (sic), senior investigator for the Attorney General's office, directly support the indictment.

In addition, under Kentucky law, there is not distinction between lawful and unlawful similar acts for evidentiary purposes. The testimony of the six witnesses allowed by the trial court was relevant and properly admitted. As the Kentucky Supreme Court recognized in Jones v. Commonwealth, Ky., 564 S.W.2d 366 (1977):

> All evidence which is pertinent to the issue and tends to prove the crime charged against the accused is admissible, although it may also prove or tend to prove the commission of other crimes by him or to establish collateral facts. The fact that it may tend to prejudice the accused in the minds of the jurors is not a ground for its exclusion. Id. at 363.

It is clear that the testimony of the six witnesses was not designed to show that petitioner was a person of bad character or had a general propensity for criminality. To the contrary, the testimony was admitted to show petitioner's criminal intent, knowledge, and the existence of a plan or scheme to bribe and harass a witness. As the Kentucky Court of Appeals held:

> Moreover, due to a lack of extensive evidence of [petitioner's] direct involvement with Keeton, there was a clear need for this evidence which outweighed its prejudicial effect. Thus, the evidence was admissible.

Ameji v. Commonwealth of Kentucky, 88-CA-1173-MR (Slip Opinion p. 9). Therefore, the admission of such evidence by the trial court was proper and petitioner's due process rights to a fundamentally fair trial were not violated.

Secondly, petitioner asserts that the evidence admitted against him was insufficient to meet the standard of Jackson v. Virginia, 443 U.S. 307 (1978). The Jackson court set forth a constitutional test to determine whether a defendant is entitled to a directed verdict of acquittal:

> The relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basis facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. Id. at 319.

The Jackson standard applies to federal habeas corpus proceedings. York v. Tate, 858 F.2d 322 (6th Cir. 1988). The standard also applies where much of the evidence supporting the conviction is circumstantial. United States v. Tager, 788 F.2d 349 (6th Cir. 1986). In the present case, the Kentucky Court of Appeals

applied this standard to determine that the evidence was sufficient. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983) (adopting the constitutional test as set forth in Jackson).

Petitioner maintains that the evidence falls short of proving that he acted in complicity with his co-defendant to bribe or intimidate a witness. Specifically, petitioner argues that the Commonwealth proved only that he and Music have lawfully attempted to obtain retractions in the past, and that he was merely present, but in no way involved in his co-defendant's misconduct. Petitioner was indicted for complicity (KRS 502.020) to bribe and harass a witness (KRS 524.020, 542.040).

Under the indictment, the Commonwealth was required to prove a violation of KRS 524.010(1)(a) which provides the following:

> (1) A person is guilty of bribing a witness when he offers, confers or agrees to confer any pecuniary benefit upon a witness or a person he believes may be called as a witness in any official proceeding with intent to:
>
> (a) Influence the testimony of that person. . . .

With respect to the intimidation charge, the Commonwealth was required to prove a violation of KRS 524.040(1)(a) which states the following:

> (1) A person is guilty of intimidating a witness when, by use of a threat directed to a witness or a person he believes may be called as a witness in any official proceeding, he:

(a) Influences, or attempts to influence the testimony of that person. . . .

Because the indictment charges petitioner with complicity, the Commonwealth was required to show that petitioner's conduct was of the type described in KRS 502.020(1)(a)-(b) which provides the following:

(1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:

(a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or

(b) Aids, counsels or attempts to aid such person in planning or committing the offense. . . .

The Kentucky Supreme Court has specifically defined "accomplice" as:

> One that who knowingly and voluntarily, and with common intent, unites with the principal in the preparation of the crime, other by being present and joining in the criminal act by aiding and abetting in its commission, or, if not present by advising and encouraging the performance of the act. Lefevers v. Commonwealth, Ky., 558 S.W.2d 585, 589 (1977).

Even assuming for the sake of argument only that the evidence of other crimes or similar acts was inadmissible, the remaining evidence is sufficient to sustain petitioner's convictions for bribing and harassing Eugena Keeton. A review of the trial evidence establishes that the Commonwealth introduced sufficient evidence to support the verdict. The undersigned adopts the Kentucky Court of Appeals' summary:

> The offenses allegedly were committed during a meeting between Music and Keeton. Music left a note at Keeton's home asking to meet with her. Keeton testified that when she met with Music at Druther's Restaurant, Music 'told me she would pay me good' and would given me 'clothing for my children' in exchange for a statement by Keeton indicating that appellant had treated her children. Music also told Keeton 'that she worked at the welfare office and she could have my kids taken if I didn't cooperate with her.' Keeton refused to sign the statement.
>
> Apparently exasperated, Music then asked if Keeton would sign a statement to the effect that appellant had not treated her children. Keeton agreed. Music left the restaurant saying she was going to get appellant. She returned several minutes later in a car driven by appellant. Keeton then drove with her husband and mother, who had also been at Druther's, to Larry's Shop a Minute where she met Music and had a

handwritten statement notarized. The statement Keeton signed, however, stated that appellant had treated her children on two occasions. Keeton testified that she signed this statement without reading it and that this was not the statement she had agreed to sign.

Appellant remained outside while Music and Keeton were inside the grocery store. Later on that day, after Keeton failed to meet up with Music as they agreed upon, Keeton and her husband and her mother stopped by the hospital because they saw appellant's car and thought they would find Music. Appellant came out to the car while Keeton went in the hospital to find Music. According to he testimony of an investigator from the attorney general's office, which was offered without objection, Keeton's mother agreed that appellant said something to the effect that if Music did not satisfy them, he would. Keeton also testified that later Music offered her $20 for her trouble.

In addition, evidence was adduced from Terry Sublett, a boyfriend of Music, that appellant stated that he had a woman working for him to get patients to change their stories. An investigator testified, without objection, that Sublett called the attorney general's office and said appellant stated that he was paying this woman $75 for each such statement. Music allegedly told appellant that she would contact

> patients in the same manner. Moreover, appellant wrote a check to Sublett for $100 which he told Sublett to give to Music. Sublett told the investigator that this was in payment for the statement Music obtained from Keeton. Also, Music admitted that she asked appellant to help her draw up a statement for Keeton to sign.

This evidence, when viewed most favorably to the prosecution, establishes that any rational trier of fact could have found, beyond a reasonable doubt, that petitioner actively counseled and assisted co-defendant Music in bribing and intimidating Eugena Keeton. Jackson, supra at 319.

Petitioner asserts that the key Kentucky decision which establishes the insufficiency of the Commonwealth's evidence is Lester v. Commonwealth, 144 S.W.2d 808 (1940). In this case, Lester and his co-defendant wife were criminally charged with conspiring to procure certain (sic) witnesses to commit perjury in a civil action. The proof offered against co-defendant established that: first, she was associated with her husband by marriage; second, she had accompanied him on some visits to potential witnesses but has remained outside their presence; and third, that she had written some of the statements eventually signed. The court found that the evidence was insufficient to establish a conspiracy when it applied the following standard:

> The circumstances relied on to establish a conviction must be so unequivocal and incriminating in their

> nature as to exclude every reasonable hypothesis of the innocence of the accused. Lester, at 18.

This "reasonable hypothesis" approach no longer meets federal constitutional standards, rendering Lester unpersuasive. United States v. Adamo, 742 F.2d 927, 932 (6th Cir. 1984). Applying the Jackson standard, Eugena Keeton's testimony, standing alone, is direct proof that co-defendant Music was acting under the guidance of petitioner. In fact, when Keeton said she would sign a paper stating petitioner had never treated her children, Music responded, "Well, I'll have to go hunt him [petitioner] I don't know where he's at. . ." [TE 193] indicating that co-defendant Music was working under petitioner's guidance.

It is clear from the trial transcript that the Kentucky Court of Appeals employed the proper standard to review the evidence, that the trial court did not abuse its discretion by allowing testimony regarding other crimes or similar acts, and even without this evidence, it was proper for the jury to have found petitioner guilty of the offenses charged. Therefore, the trial court did not err by denying petitioner's motion for a directed verdict of acquittal.

In summary, petitioner has failed to demonstrate that he is entitled to a writ of habeas corpus in this Court. Accordingly, it is recommended that respondent's motion to dismiss be granted and this action be stricken from the docket with prejudice.

Particularized objections to this Report and Recommendation must be filed within ten (10) days of the date of service of the same or

further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd, 474 U.S. 140 (1985); Wright v. Holbrook, 794 F.2d 1152, 1154-55 (6th Cir. 1986). A party may file a response to another party's objections within ten (10) days after being served with a copy thereof. Rule 72(b), Fed. R. Civ. P.

This the 15th day of January, 1991.

/s/ Peggy E. Patterson
PEGGY E. PATTERSON
United States Magistrate Judge

Date of Entry and Service: Jan. 16, 1991